ER 85-619

FYI

Office of Legislative Liaison
Routing Slip

TO:		ACTION	INFO
1.	D/OLL		X
3.	DD/OLL		V
3.	Admin Officer		
4.	Liaison		
5.	Legislation		X
6.	B		X
7.	T		X
8.	W		X
9.			
10.			

SUSPENSE _____ Date

Action Officer:

Remarks:

Name/Date 11 Feb 85

EXECUTIVE SECRETARIAT

ROUTING SLIP

TO:		ACTION	INFO	DATE	INITIAL
1	DCI		X		
2	DDCI		X		
3	EXDIR		X		
4	D/ICS				
5	DDI				
6	DDA				
7	DDO		X		
8	DDS&T				
9	Chm/NIC				
10	GC	X			
11	IG				
12	Compt				
13	D/Pers				
14	D/OLL		X		
15	D/PAO				
16	SA/IA				
17	AO/DCI				
18	C/IPD/OIS				
19	NIO /LA		X		
20	C/LA/DO		X		
21					
22					
	SUSPENSE	1200 - 15 Feb 85			
		Date			

Remarks

Please prepare coordinated response for my signature.

Executive Secretary

11 Feb 85

Date

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VIA LDX 0950

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85- 619

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

February 8, 1985

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MEMORANDUM FOR COL R.J. AFFOURTIT
Executive Secretary
Department of Defense

MR. RONALD L. BLUNT
Special Assistant to the Attorney General
Department of Justice

[redacted] 25X1
Executive Secretariat
Central Intelligence Agency

AMB. HARVEY FELDMAN
Washington Representative to the United States
Representative to the United Nations
Department of State

SUBJECT: Clarification of U.S. Acceptance of Compulsory Jurisdiction of the International Court of Justice (C)

Attached is a memorandum prepared by the State Department outlining the modifications and clarifications regarding U.S. participation in the International Court of Justice. Also included in the memorandum is a proposed course of action regarding Congress. We would like to have your agency's comments/concurrence regarding these issues by February 15, 1985. (C)

Robert M. Kimmitt
Executive Secretary

Attachment:
State's memo of February 4, 1985

cc Mr. Nicholas Platt
Dept of State

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DECLASSIFY ON: OADR

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A

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United States Department of State

Washington, D.C. 20520 0950

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February 4, 1985

MEMORANDUM FOR MR. ROBERT C. MCFARLANE
THE WHITE HOUSE

Subject: Clarification of U.S. Acceptance of the Compulsory Jurisdiction of the International Court of Justice

On January 17, the President decided that the United States would withdraw from further participation in the Nicaragua case in the ICJ, and that the 1946 U.S. declaration accepting the Court's compulsory jurisdiction should be clarified so as to foreclose, insofar as possible, similar cases from being brought against the United States in the future. We have identified two such clarifications upon which interagency concurrence is requested. In both cases we have sought to limit controversy by drawing to the extent possible upon language contained in other countries' declarations, and by confining the changes to matters that can be directly related to the Court's November 26 jurisdiction decision in the Nicaragua case.

Modification/Termination on Notice

The first of these clarifications would replace the six months' notice clause of the 1946 declaration with language expressly reserving the right to modify or terminate that declaration at any time and with immediate effect. The purpose of this clarification is to overcome, for any future case, the effect of the Court's holding that the existing six months' notice clause applied to our April 6 note suspending, for a two-year period, our consent to the Court's jurisdiction over Central American disputes. More than half of the countries accepting the Court's compulsory jurisdiction have included in their declarations an express reservation of right to modify or terminate their declarations upon notice, a right which we believe already existed under the law governing such declarations notwithstanding the Court's judgment to the

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contrary. The specific text we propose is derived from language in the United Kingdom's 1969 declaration, and would provide that

> The United States of America reserves the right at any time, by means of a notification addressed to the Secretary-General of the United Nations, and with effect from the moment of such notification, either to add to, amend or withdraw any of the foregoing reservations, or any that may hereafter be added, or to otherwise modify, or to terminate, this declaration.

We have inserted the phrase "or to otherwise modify" in order to cover changes other than those relating to reservations.

Armed Conflict

The second clarification would add a fourth reservation to the three already contained in the 1946 declaration, expressly excluding from our acceptance of the Court's compulsory jurisdiction:

> disputes relating to or connected with allegations of, or facts or situations involving, either the use of force (whether direct or indirect), or hostilities, or armed conflicts, or individual or collective actions taken in self-defense, or resistance to aggression, or similar or related allegations, facts or situations in which the United States of America is, has been or may in the future be involved.

This language is aimed at the Court's finding that the Nicaragua case is amenable to judicial resolution notwithstanding that the central Nicaraguan allegation concerns a purported ongoing unlawful use of armed force, the adjudication of which would inevitably involve competing claims by the United States to the exercise of its inherent right of collective self-defense. Despite the Court's decision to the contrary, we continue to believe that the UN Charter reserves the evaluation of such questions to the exclusive competence of the political organs, in particular the Security Council, and does not permit the ICJ to intefere with the right of self-defense. We believe that it was never the intention of the framers

of the Charter that such matters could fall within the competence of the ICJ. This reservation would thus clarify the U.S. declaration expressly to reflect the United States understanding of the inherent limits to the scope of the Court's compulsory jurisdiction under the Charter.

The specific language chosen for the new reservation is an adaptation of a reservation in the declarations of India and El Salvador. We have modified this language somewhat in order to conform it more closely to the situation resulting from the Court's November 26 judgment. In particular, our reservation would come into play upon the mere allegation of a circumstance falling within its scope, in order to protect against the possibility that the Court would defer a decision on the applicability of the reservation to the merits stage of a case.

In order best to ensure that future cases similar to the Nicaragua case would be barred, the language of the new reservation is deliberately comprehensive. Since, however, the reservation could be invoked against the United States on the basis of reciprocity, it could operate to prevent the United States from successfully bringing suit in a wide range of cases. The inclusion of "allegations" among the events triggering the reservation, while increasing our ability to defeat claims against the United States prior to the merits phase, also substantially increases the reciprocity risk. On balance, we believe that the advantage gained toward precluding any future Nicaragua cases outweighs this disadvantage.

The text of the existing U.S. declaration, modified to show the proposed clarifications in context, is attached. The clarifications would be made by means of a note to the UN Secretary-General amending the 1946 declaration.

Additional Considerations

Proceeding with these two limited clarifications would not prejudice our ability to consider, over the longer term, whether additional clarifications to, or the complete termination of, the U.S. acceptance of the Court's compulsory jurisdiction may be warranted. (For example, we considered changes to the U.S. multilateral

treaty, or "Vandenberg", reservation, but would not do so at this time in the interest of not jeopardizing the chance, however slight, that the Court may find that reservation to be applicable to some of Nicaragua's claims after considering them on the merits.) We intend to begin such a broader examination at the earliest possible opportunity.

As a consequence of the Court's November 26 judgment, it is probable that the six months' notice clause of the 1946 declaration would be held to apply to the proposed clarifications. Hence, we would be vulnerable to suits similar to Nicaragua's during the six months following the date the clarifications are notified to the Secretary-General, although we are not aware of any likely claimants.

Article 36(6) of the Court's Statute vests the Court with the power to decide any dispute concerning its jurisdiction in a particular case. There thus can be no guarantee that the Court will interpret any particular reservation in the manner we intend. We have therefore considered whether to make the proposed "armed conflict" reservation "self-judging" in the manner of the Connally amendment to the U.S. "domestic jurisdiction" reservation in the 1946 declaration. Any "self-judging" reservation would be highly controversial, and in the absence of any precedent we cannot predict how the Court might interpret such a reservation. (There is a significant chance that the Court would treat such a reservation as invalid in toto.) For these reasons, we do not believe that attaching a "self-judging" feature to the new reservation could be relied on to give us any greater protection from suit. In any event, any new "self-judging" reservation could be used reciprocally against the United States, leaving a substantial risk that we could never maintain a compulsory-jurisdiction action against any State prepared to make an arbitrary assertion that armed conflict or the use of force is involved. (An analogous risk already exists by virtue of the Connally amendment.)

Congressional Aspects

If, in keeping with the President's January 17 decision, it is determined to proceed with these recommended clarifications, it will also be necessary to

decide to what extent the Congress should be involved. The 1946 declaration was made with the advice and consent of the Senate, a procedure that was followed even though the declaration is not a treaty. While we believe that as a legal matter Senate or congressional approval is not required to modify or clarify the declaration (particularly where, as here, the action is taken to lessen, rather than increase, the exposure of the U.S. to suit in the Court), congressional criticism is likely if we proceed without congressional involvement. (Some criticism of this sort was encountered when we unilaterally modified our acceptance last April to exclude Central American disputes for a two-year period.) Seeking formal Senate approval of the clarifications would, on the other hand, cause delay and undermine Executive prerogatives. Seeking formal approval would also provide an opportunity for hearings that would likely turn into a wide-ranging inquiry into the U.S. relationship to the Court in general, and the President's decision in the Nicaragua case in particular. On balance we believe that we should not seek congressional action on these clarifications. In order, however, to secure maximum congressional understanding and support, we believe that we should not proceed without prior congressional consultations, particularly with the Senate majority and minority leaders and with influential members of the Foreign Relations Committee.

We seek interagency concurrence in the recommended clarifications and in the recommended course of action with the Congress.

Nicholas Platt

Nicholas Platt
Executive Secretary

Attachment:

Text of 1946 Declaration Showing
Proposed Clarifications.

Text of U.S. Declaration of August 14, 1946
As Modified by Proposed Clarifications

I, Harry S Truman, President of the United States of America, declare of behalf of the United States of America, under Article 36, paragraph 2, of the Statute of the International Court of Justice, and in accordance with the Resolution of 2 August 1946 of the Senate of the United States of America (two-thirds of the Senators present concurring therein), that the United States of America recognizes as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes hereafter arising concerning

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation;

Provided, that this declaration shall not apply to

(a) disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or

(b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America; or

(c) disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction; [and] or

(d) disputes relating to or connected with allegations of, or facts or situations involving, either the use of force (whether direct or indirect), or hostilities, or armed conflicts, or individual or collective actions taken in self-defense, or resistance to aggression, or similar or related allegations, facts or situations in which the United States of America is, has been or may in the future be involved; and

Provided further, [that this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration] that the United States of America reserves the right at any time, by means of a notification addressed to the Secretary-General of the United Nations, and with effect from the moment of such notification, either to add to, amend or withdraw any of the foregoing reservations, or any that may hereafter be added, or to otherwise modify, or to terminate, this declaration.

Done at Washington this fourteenth day of August 1946.

/S/

Harry s Truman